United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

Case No. **74-1933**

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

VERMONT MARBLE COMPANY,
Plaintiff-Appellee

V.

WACO SCAFFOLD & SHORING COMPANY,
DIVISION OF BLISS & LAUGHLIN
INDUSTRIES, INC.,
Defendant-Appellant

Appeal from the United States District Court
for the District of Vermont
Honorable James S. Holden, Chief U.S.D.J.

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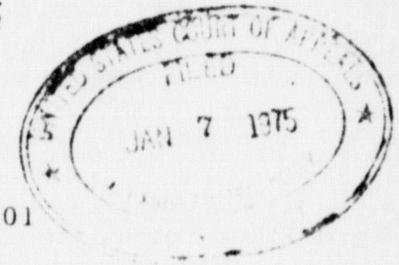

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REPLY BRIEF

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RE: POINT I A. OF BRIEFS

As against Waco's claim in its main brief that for the reasons set forth under POINT I A. thereof (Waco Br. 17-21) error was committed below in holding that the Oldenburg letter of August 23, 1969 constituted an offer, VM, in its answering brief (VM Br. 2-5) relies upon Jaybe Construction Company v. Beco, Inc., 3 Conn Cir 406, 216 A2 208, 211 (1965) and Bachli v. Holt, 124 Vt 159, 163, 200 A2 263, 266 (1964) as supporting authorities, but an examination of these cases reflects that they are not.

In Jaybe, in which the unsolicited letter was held to constitute an offer, the Court said (216 A2 at 211):

> "The determination whether a certain communication by one party to another is an operative offer, and not merely an inoperative step in the preliminary negotiations, is a matter of interpretation in the light of all the surrounding circumstances.";

(please see Waco Br. 17), and then went on to say:

> "From the nature of such communications, the question whether certain acts or conduct constitutes a definite proposal, upon which a binding contract may be predicated without any further action on the part of the person from whom it proceeds, or a more preliminary step which is not susceptible, without further action by that party, of being converted into a binding contract depends on the nature of the particular acts or conduct in question and the circumstances attending the transaction. It is impossible to formulate a general principle or criterion for the determination."; (emph. supp.)

and after this caveat concluded with the following:

> "Accordingly, whether a communication naming a price

is a quotation or an offer depends on the intention of the party as it is manifested by the facts and circumstances of each particular case."

The facts and circumstances in Jaybe and those in our case are so different as to preclude Jaybe from being supporting authority here.

In Jaybe the plaintiff and other contractors had obtained the plans and specifications which had been prepared for bidding (216 A2 209-10), and it is implicit in that case that these were "final" or "firm" plans and specifications. It was based on these documents that the defendant, without solicitation, sent a letter to the plaintiff and other contractors looking to the furnishing and installation of certain equipment called for under the overall plan for a stated sum. Idem.

On the other hand, in our case the facts and circumstances are altogether different as is apparent from Waco's main brief at 18-20 (we note here that nothing appears in V.I's answering brief claiming that any of the matters there recited are inaccurate). As there appears, when Oldenburg and Richardson met on August 6, 1968 Richardson told him VM was working on "budget estimates" for submission to the project architect. Please see Richardson's testimony as to

what he meant by a "budget estimate", quoted at length (idem), and as there stated he differentiated a "bid figure" from a "budget estimate" or "budget figure", the latter two used interchangeably.

At the same time that Richardson asked Oldenburg to give him an "estimate" on the cost of scaffolding, he invited him to look at the architect's preliminary drawings. Idem. 18. It is to be noted here that even as late as December 24, 1968 VM did not yet have the specifications upon which to base a firm bid (id. 19).

Certainly it is not arguable but that when a subcontractor proposes at a fixed price to do the work specified in final or firm plans and specifications prepared for bidding on the job, a firm bid or offer may be inferred, absent other facts and circumstances establishing the contrary.

However, in our case, the only documents available to Waco with respect to the project were the architect's preliminary drawings, based upon which VM requested Waco to submit an estimate on the cost of scaffolding. It would be altogether unwarranted to conclude that the Oldenburg letter submitted in response thereto constituted a firm bid or an offer.

These facts and circumstances manifest an intention not only on Waco's part, but also on VM's part, that the quotation be a mere "estimate" to enable VM to work on a "budget estimate" as that term was explained by Richardson, and as quoted, Waco Br. 18-19.

The second case relied upon by VM is the Bachli case, which is not even in point on the issue involved here, ie., whether the Oldenburg letter constituted an offer.

In Bachli the issue was not whether an offer had been submitted by the subcontractor, but whether as the general contractor claimed, the offer which was approved by the owner's architect, extended to the owner so that whatever liability existed for the subcontractor's performance of the plumbing and heating contract attached to her. 124 Vt 159-60.

The Court found that on the evidence it was the general contractor who called upon the subcontractor to submit a bid for the plumbing and heating contract and furnished him with specifications and drawings for the plumbing and heating details. Idem. 160. The Court held that when the subcontractor complied by letter he made an offer to the general contractor to perform the work specified at the price given; that when the offer was accepted by the general contractor, the contract was completed; that since the letter was directed to the general contractor alone, he was the only one who could accept it; and that because it was only extended to him, neither the owner nor her architect could accept the offer. Idem. 163.

Surely, Bachli is no authority on the question of whether an offer had been submitted, but only on the question of whether an offer directed to a particular person could be

accepted by another under the facts and circumstances set forth in that case.

We would add that the dissimilarity between the two cases extends to the documents involved. Implicit is that the drawings and specifications for the plumbing and heating details furnished by the general contractor to the subcontractor were "final" or "firm" documents, even as in the Jaybe case, and not as is the situation in our case, merely preliminary architect's drawings.

It follows that VM's claim that Bachli illustrates a common procedure and that it would be a deviation from normal conduct and understanding to hold that the Oldenburg letter was not a firm offer to do a job for the price (VM Br. 4) is not supported from anything appearing in Bachli.

VM claims that "it was the accepted practice of VM to rely on such a letter as the Oldenburg letter when VM made a contract for the sale and installation of its marble setting and that VM did rely on the Oldenburg letter in this case, relying upon matter appearing in Tr. 38-9. VM Br. 5-6.

While Richardson did testify that "as far as you're (VM) concerned" this was its accepted practice, this can have no materiality in the absence of any evidence whatsoever that this practice had ever been communicated to Waco. The only evidence with respect to what the practice between Waco and VM had been on other jobs is apparent from the uncontradicted evidence appearing at pages 6-7 of Waco's brief and does not

support VM's assertion insofar as it pertains to dealings with Waco. To the foregoing may be added that Waco's represenations with respect to the customary practice in the trade generally, as stated at page 7 of Waco's brief, were unchallenged by any contradictory evidence.

VM is not entitled to claim that by reason of its undisclosed practice the Oldenburg letter became converted into an offer. Please see Bachli, 124 Vt at 164.

Even as claimed in our main brief, we submit that the Oldenburg letter was merely an inoperative step in the preliminary negotiations between the parties, and did not constitute an offer.

RE: POINT I B. OF BRIEFS

Assuming that the Oldenburg letter of August 23, 1968 constituted an offer, the question briefed by both parties under this point is whether the Navari letter of April 16, 1969 constituted an acceptance or a counter-offer.

It is beyond any dispute that at the first meeting between VM's Richardson and Waco's Oldenburg on August 6, 1968, as Richardson testified, he informed Oldenburg that the job would be completed in six months, and that he, Richardson, stated that he believed the job would start in June of 1969. Please see Richardson's testimony, quoted at page 21-22, Waco Br.

Even VM admits that with respect to the starting time, this amounted to advice by Richardson to Oldenburg "that the

job was not going to start until June of 1969" (VM Br. 11-12), or in other words, that it would start in June of 1969.

In substance, VM asserts that Waco, without merit, is claiming in its brief that "duration of the job" in the Oldenburg letter means that there would be no contract unless the job started within six months (VM Br. 7); and further, that Waco is also claiming without merit, that if the Oldenburg-Navari exchange resulted in a contract (VM Br 18-19), time was made of the essence therein. However, Waco's brief was not intended to, and we believe, does not make such claims.

What Waco's Brief in Point I B. does claim is simply that under the attendant facts and circumstances commencing with the August 6, 1968 meeting and terminating with the Oldenburg letter, the phrase "Duration of job" as used in that letter, cnstituted an offer by Waco to perform the scaffolding services on VM's marble setting project "within the time framework" of that job as Richardson had represented it to Oldenburg, ie., to start June 1969 and to be completed in six months" (Waco Br. 22). Waco's brief clearly indicated that by the "time framework" it did not mean to insist, literally, upon a June 1969 start, but would accept a reasonable time thereafter provided there was due diligence. Similarly, the job need not literally have been completed within six months provided that, "with due diligence, it was completed within a reasonable time thereafter". Please see Waco Br. 47.

Having erroneously stated Waco's claim, VM's brief then quotes from Oldenburg's testimony (VM Br. 7, 8, 9) to support its contention that "duration of the job" did not mean that there was no contract unless the job started within six months "as now claimed by Waco" VM Br. 7. Of course, Waco made no such claim.

However, in the interest of accuracy, we note that as to the testimony it quotes at pages 7-8 of its brief, VM is in error in stating that at the time it was given Oldenburg was being examined with reference to the Oldenburg letter, Ex. 7; he was being examined with reference to the contents of the notes he had made after he had received a telephone call from Richardson on August 22, 1968 (the day before the date of the Oldenburg letter). Please see Tr. 268. These notes, which are not in evidence, are actually marked Def. "CZ" for Id., and not "CS" as appears at Tr. 268. Ex. "CS" is in evidence and is a purchase order dated April 4, 1968.

However that may be, if this testimony has any materiality, it is not inconsistent with Waco's claim as to the construction required to be give to "Duration of job" as used in the Oldenburg letter; if it has any materiality, it supports that position.

In any event, the quoted testimony of Oldenburg may not be read piecemeal, but is required to be read with all the other uncontroverted credible evidence on the subject,

together with Richardson's earlier representations to Oldenburg of August 6, 1968 stated above and as quoted, Waco BR. 21-22. It is submitted that "Duration of job" as used in the Oldenburg letter means that the job would be completed within six months from the starting time, to start in June 1969, subject to the qualifications set forth in the last paragraph starting on parge 8, supra.

Even if we accept VM's claim that the Oldenburg letter constituted an offer, there was no reason for VM to believe that "Duration of job" as used in the offer meant other than as set forth above, and having in mind the attendant facts and circumstances, any inference or understanding on VM's part that the quoted phrase meant other than as there set forth is altogether without warrant.

This is so because, as shown above, except with respect to the time schedule of the job as Richardson represented it to Oldenburg on the August 6, 1968 meeting, the evidence does not disclose any communication between the parties from that date and until Waco received the Navari "acceptance" letter of April 16, 1969, with respect to a change in the time schedule of the job, notwithstanding that on March 3, 1969, some six weeks before the date of the Navari letter, VM and the general contractor agreed to an amended schedule, Waco Br. 28.

If as VM claims, it took the Oldenburg letter to constitute an offer by Waco, then it was an offer to furnish the scaffolding at a fixed price for the job, and not an offer to supply the scaffolding at a per diem or per weekly or per monthly charge.

The claim of VM is:

> "WACO was in the business of renting scaffolding. 'Duration of job' meant that its equipment would stay at the job until the job was finished and was not subject to be removed to another job." (VM Br. 8)

What VM is saying then, is that under the attendant facts and circumstances, by inclusion of "Duration of job" in the Oldenburg letter Waco was offering to tie up its equipment for as long as VM took to complete the job, whether it be within the six month period represented by Richardson or the nineteen months that it actually took, whether based upon a starting time in June of 1969 as represented by Richardson or years longer if that should be the case, even if the failure to start the job in June or to complete the job within six months or within a reasonable time thereafter, was not by reason of any fault on the part of Waco, and even if such failure should be for reasons within the control of VM, or because of a delay on the part of its supplier.

It is submitted that under the attendant facts and circumstances to attribute such intention to Waco is absurd, and for VM to claim that from "Duration of job" it was

warranted in concluding that such was Waco's intention is equally absurd.

As to the delay on the part of VM's supplier, from what appears in the full paragraph on page 21 of VM's brief, it would seem that VM is asserting that initially the marble was to be supplied by the owner, and not by VM, and that in March 1969 the subcontract between VM and the general contractor (Ex. 15), was amended to provide that VM would supply the marble.

The fact is that the contract (Ex. 15), and specifically Schedule B thereof dated February 20, 1969, establishes that it was VM who was required to supply the marble, and that under the amendment of March 3, 1969 of Schedule B VM continued to be required to supply the marble, the change by the amendment being only in the type of Italian marble VM was to supply.

In addition, in the paragraph under consideration, VM says that there is no evidence or findings to show that VM was responsible for the delay in delivering marble. But the burden of proof was on VM to establish that as between it and Waco, the delay in marble delivery was legally excusable (Waco Br. 45), and the law is that even if the delay was caused by the failure of VM's supplier, and through no fault

of VM or Waco, VM's delay is not legally excusable in the absence of a provision in the agreement between VM and Waco so providing (id. 46), and of course there was no such provision in their agreement.

Additionally, it is apparent from the paragraph now under consideration, that in VM's view its contract with the general contractor had been entered before the March of 1969 amendment, and with respect thereto VM claims that there "is no evidence or findings to show that this amendment was not within the rights of the owner or general contractor..." If prior to this amendment the contract had been entered into, as VM would have it, and if a conclusion with respect thereto was material, the Trial Judge was required to conclude as a matter of law that such an amendment could not be unilaterally made by either party to the contract because the contract itself, Exhibit 15, is in evidence, and it contains no provision authorizing either party, or for that matter the owner, to unilaterally amend its provisions.

However may be the contentions advanced by VM in the paragraph under consideration, it is inescapable that before the Navari letter of April 16, 1969, held to constitute an "acceptance" of Waco's "offer", the general contractor and VM had agreed to the amendments of March 1969, and that these amendments included a change in the type of marble required to be supplied by VM (as to circumstances, please see Ex. S; Waco Br. 45-46), as well as a change in the time schedule (as

to circumstances, please see Waco Br. 27-28), without any communication with respect to either change to Waco from VM or anyone else.

VM can take nothing by the claims advances by it in the full paragraph appearing at page 21 of its brief.

RE: POINT IV OF BRIEFS AS TO "COERCION"

In essence the Trial Judge held that, with respect to the agreement reached between Waco and VM on April 10, 1970, it was unenforceable for want of competent consideration (JA 65), and that thereby Waco had "coerced a better bargain" (JA 67). Pages 51-57 of Waco's brief is addressed to the "coercion" issue, as are pages 25-27 of VM's brief.

We have searched VM's brief in vain in an effort to find something meeting our contention that Finding 15 (JA 58) negates a conclusion of "coercion" on the part of Waco, for VM had an alternative (Waco Br. 57) ie., that VM could have employed S. A. Beltrone, Inc. to do the job VM claims Waco had agreed to do, even as Finding 16 (JA 58) establishes that as between Beltrone and Waco, VM decided upon Waco. That VM avoids meeting this contention makes the contention no less valid.

The "coercion" or "duress" with which we are concerned here is of that species sometimes referred to as "economic duress" or "business compulsion". Austin Instrument, Inc. v. Loral Corporation, 29 NY2 124, 272 NE2 533,

533 (1971). That case clearly sets forth the law applicable here as follows:

> "A contract is voidable on the ground of duress when it is established that the party making the claim was forced to agree to it by means of a wrongful threat precluding the exercise of his free will.",

citing authorities, and that:

> "[I]n cases such as the one before us, ... proof that one party to a contract has threatened to breach the agreement by withholding goods unless the other party agrees to some further demand."

demonstrates economic duress or business compulsion, citing authorities, and concludes with the following:

> "However, a mere threat by one party to breach the contract by not delivering the required items, though wrongful, does not in itself constitute economic duress. It must also appear that the threatened party could not obtain the goods from another source of supply and that the ordinary remedy of an action for breach of contract would not be adequate."; (emph. supp.)

citing cases. To the cases cited for the proposition emphasized may be added U.S. v. Bethlehem Steel Corp., 315 U.S. 289, 86 L. Ed 855, 864-5 (1942); U.S. v. Bell, 259 F.S. 602, 605 (N.D. Okla. 1966); Friedman v. Bache & Co., 321 F.S. 347, 350 (1971), affirmed 439 F2 349 (Cir. 5-1971).

Thus, if despite our contrary contentions as briefed, it is held that a binding contract was entered into between Waco and VM, and that by reason of Waco's threats to breach it the parties, at their meeting held on April 10, 1970, entered into another agreement which resulted in a better bargain for Waco, it was error as a matter of law to hold that the later agreement was without consideration because the

better bargain had been coerced by Waco, for it is established that as of the April 10 meeting VM had a viable alternative to performance by Waco, and for the further reason that VM has failed to establish that the ordinary remedy of an action for breach of contract would not be adequate.

CONCLUSION

This Reply Brief is intended to be addressed only to what appears to Waco to be the chief errors in fact or law in the VM brief and is not intended to be taken as agreeing with any other of the positions advanced in that brief. As to these other contentions we see no need for considering them in this Reply and rest on the matters set forth in our main brief.

Respectfully submitted,

DICK, HACKEL & HULL

Dated: January 3, 1975

By Bernard R. Dick, a member
Bernard R. Dick

By Donald H. Hackel, a member

Attorneys for Appellant
Waco Scaffolding Company

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

VERMONT MARBLE COMPANY, Plaintiff-Appellee	)	
V.	)	SECOND CIRCUIT
WACO SCAFFOLD AND SHORING COMPANY, a Division of Bliss & Laughlin Industries, Inc., Defendant-Appellant	)	DOCKET NO. 74-1933

CERTIFICATE OF SERVICE OF BRIEF BY DEFENDANT-APPELLANT

I hereby certify that on the 3rd day of January, 1975, I served the Reply Brief of Defendant-Appellant, Waco Scaffold and Shoring Company, by mailing the same addressed to Robinson E. Keyes, Esq., a member of Ryan, Smith & Carbine, Ltd., Mead Building, Rutland, Vermont 05701, Attorneys for Plaintiff-Appellee, Vermont Marble Company.

Dated this 3 day of January, 1975.

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